

## **CHAPTER 12.**

# **Future Implementation of the Federal DBE Program**

Chapter 12 explores further improvements to GDOT's implementation of the Federal DBE Program. Part A of this section presents this analysis.

In Part B of Chapter 12, BBC discusses potential program measures for GDOT's state-funded contracts, as well as tracking of DBE and MBE/WBE participation in these contracts. Part C reviews the need for appropriate GDOT investment in staff, training and information systems when implementing the Federal DBE Program.

### **A. Federal Requirements in Implementing the Federal DBE Program**

Regulations at 49 CFR Part 26 and associated USDOT guidance, including a sample plan provided by USDOT, provide direction on implementation of the Federal DBE Program. Plan elements are discussed in the order identified in 49 CFR Part 26. Because only certain portions of the Federal DBE Program are discussed below, GDOT should refer to the complete federal regulations when considering its implementation of the Program.

**Reporting to USDOT — 49 CFR 26.11 (b).** GDOT must periodically report DBE participation to FHWA. BBC's review indicates that GDOT may need to compile additional information on local agency contracts using FHWA funds administered through GDOT. GDOT might improve other aspects of its DBE reporting as well. Recommendations are provided later in Chapter 12 (see BBC discussion under 49 CFR 26.55).

**Bidders list — 49 CFR Section 26.11 (c).** As part of its implementation of the Federal DBE Program, GDOT must develop a bidders list of firms that are available for its contracts. The bidders list must include the following information about each available firm:

- Name;
- Address;
- DBE status;
- Age; and
- Annual gross receipts.

GDOT might consider developing a new bidders list that includes information from BBC's availability interviews and BBC's analysis of GDOT's prequalification and registration databases.

In the future, GDOT should add businesses to the bidders list as they are newly prequalified and registered. To do so, it should consider expanding the information collected as part of its prequalification and registration processes. GDOT must also collect information concerning annual gross receipts to be in compliance with 49 CFR Section 26.11 (c).

The bidders list can also provide vendor data that will help GDOT track utilization of DBEs and minority- and women-owned firms in its FHWA- and state-funded contracts. GDOT should request firms seeking to do business with the Department to provide race/ethnicity/gender ownership status for the company (on a self-reported basis).

**Prompt payment mechanisms — 49 CFR Section 26.29.** GDOT requires prime contractors to pay subcontractors within 15 days of receiving payment from GDOT. This prompt payment requirement appears to be in compliance with 49 CFR Section 26.29.

**DBE Directory — 49 CFR Section 26.31.** GDOT maintains a current DBE Directory for DBEs certified in Georgia on its website.

**Overconcentration — 49 CFR Section 26.33.** An agency implementing the Federal DBE Program is required to devise appropriate measures if it finds that DBEs are so overconcentrated in certain types of work as to unduly burden the opportunity of non-DBEs in that type of work. GDOT's current DBE Program Plan indicates that GDOT will annually review information to determine whether there is overconcentration.

GDOT's DBE Program Plan also lists measures it might use to address any overconcentration. Its potential measures currently include "the use of incentives, technical assistance, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field."

GDOT might add the following to these measures:

GDOT may also consider varying use of contract goals, to the extent consistent with Section 26.51, to ensure that non-DBEs are not unfairly prevented from competing for subcontracts.

Such a measure is indicated in 49 CFR Section 26.33(b). As discussed in previous chapters of this report, GDOT should monitor future utilization of DBEs and non-DBEs in areas such as trucking and hauling, and consider appropriate actions, such as varying its use of contract, as necessary.

In accordance with 49 CFR Section 26.33(c), GDOT would need to obtain the approval of FHWA for any determination of overconcentration and the measures it would employ to address it. Once approved, the measures would become part of GDOT's DBE Program Plan.

**Business development programs — 49 CFR Section 26.35.** Business development programs (BDPs) are efforts to assist DBE-certified firms to develop the capabilities to compete outside of the DBE Program. GDOT might develop a BDP for DBE-certified firms per the federal regulations. Specialized assistance would be tailored to developing firms and firms in transitional stages of development.

Guidance in the Federal DBE Program concerning administration of business development programs is provided in 49 CFR Section 26.35 and Appendix A to 49 CFR Part 26.

**Mentor-protégé program – 49 CFR Section 26.35 and Appendix D to 49 CFR Part 26.**

For many years, GDOT participated in the State of Georgia's mentor-protégé program. The State is no longer implementing this program. GDOT might consider partnerships with other agencies to create a mentor-protégé program for small contractors and consultants, including DBEs. Success would require participation from mentors, which has been a challenge for GDOT in the past.

**Responsibilities for monitoring the performance of other program participants –**

**49 CFR Section 26.37.** The Final Rule effective February 28, 2011 revised requirements for monitoring and enforcement mechanisms to ensure that work committed to a DBE at contract award or through modifications to the contract is actually performed by the DBE to which the work was committed. These requirements are outlined in 49 CFR Section 26.37.

**Fostering small business participation – 49 CFR Section 26.39.** The Final Rule effective February 28, 2011 added a requirement for transportation agencies to foster small business participation in their contracting. GDOT has submitted an SBE Program for FHWA review, as discussed in Chapter 11.

**Setting overall annual DBE goals – 49 CFR Section 26.45.** Chapter 10 of the report presents information for GDOT to use as it sets an overall DBE goal. GDOT should update the portion of its DBE Program Plan pertaining to its overall DBE goal.

On February 3, 2010, USDOT published a Final Rule concerning how often agencies that implement the Federal DBE Program are required to submit overall annual DBE goals. Agencies such as GDOT need to develop and submit overall annual DBE goals every three years. That change was effective as of March 5, 2010. GDOT's current overall DBE goal is effective through FY 2012.

The Federal DBE Program provides that agencies may adjust their overall DBE goals within these three-year periods in order to reflect any changed circumstances, per 49 CFR Section 26.45(f)(1)(ii). Agencies must submit such an adjustment to FHWA for review and approval.

**Maximum feasible portion of goal met through neutral programs.** GDOT must meet the maximum feasible portion of its overall goal through race-neutral means of facilitating DBE participation. Taking this requirement into consideration, GDOT should maintain its current neutral efforts and evaluate and consider using additional neutral measures discussed in Chapter 11.

GDOT must project the portion of its overall DBE goal that could be achieved through neutral means. It should consider the information and analytical approaches presented in Chapter 11 when making future projections.

**Use of DBE contract goals.** The Federal DBE Program requires state and local transportation agencies to establish contract goals to meet any portion of its overall DBE goal that they do not project being able to meet using race-neutral means, as noted in 49 CFR 26.51(d).

- Based on this report and other information and evidence, GDOT should consider whether it should continue to utilize contract goals to meet any portion of its overall annual DBE goal that it does not project being able to meet using race-neutral means.
- If GDOT determines that it needs to continue to establish DBE contract goals, it should also evaluate which, if any, DBE groups should be considered eligible to participate in any contract goals it determines are appropriate per the federal regulations to use for its FHWA-funded contracts (or other USDOT-funded contracts). GDOT should consider this report and other information to make this determination.
- Should GDOT, in the future, determine that some DBE groups should not be eligible to participate in any DBE contract goals, GDOT must request a program waiver per 49 CFR Section 26.15.

USDOT guidelines on the use of DBE contract goals include the following:

- Contract goals may only be used on contracts that have subcontracting possibilities.
- Agencies are not required to set a contract goal on every FHWA-funded contract.
- Over the period covered by the overall DBE goal, an agency must set contract goals so that they will cumulatively result in meeting the portion of the overall goal that agency projects being unable to meet through neutral means.
- An agency's contract goals must provide for participation by all DBE groups eligible for race-conscious measures. If GDOT were to determine, in the future, that it should include specific DBE groups but not others for contract goals, GDOT must submit a waiver request to FHWA (see 49 CFR Section 26.15).
- Subdivision of the DBE contract goal is not permitted under the Federal DBE Program unless approved by a waiver. Based on the data presented in Chapter 6 concerning the utilization of DBEs on GDOT FHWA-funded contracts, white women-owned DBEs accounted for more than 60 percent of the total DBE participation and minority-owned DBEs were less than 40 percent of DBE participation. One state, the Illinois Department of Transportation, has requested a waiver to implement separate contract goals for women-owned DBEs and minority-owned DBEs. Given the utilization results for white women-owned DBEs and minority-owned DBEs, GDOT might further explore with FHWA what actions might be appropriate and whether any waiver request is warranted.
- GDOT must maintain and report data on DBE utilization separately for contracts that include and do not include DBE goals.

**Termination of DBE contractor.** The Final Rule effective February 28, 2011 strengthens requirements around termination of DBE subcontractors that a prime contractor used to meet a DBE contract goal. With the new rule, prime contractors cannot terminate a DBE firm without the written consent of GDOT, and the DBE firm can be terminated only for good cause. The Final Rule lists what constitutes good cause for this purpose. GDOT may need to expand the section of its DBE Program Plan to reflect the new rule.

**Analysis of the reasons for not meeting an overall DBE goal — 49 CFR Section 26.47(c).**

One addition to the Federal DBE Program made under the Final Rule effective February 28, 2011 requires agencies to do the following if its DBE participation reports for a fiscal year are less than the overall goal for that fiscal year:

1. Analyze in detailed the reasons for the difference; and
2. Establish specific steps and milestones to correct the problems identified and to enable the agency to fully meet the goal for the new fiscal year.

The Federal DBE Program requires agencies to prepare DBE utilization reports based on firms actually certified as DBEs. However, BBC's analysis of the overall DBE goal in this study is based upon current *and* potential DBEs.

- One of the reasons that GDOT might fall short of its overall DBE goal is that some minority- and women-owned firms participating in GDOT's FHWA-funded contracts might not be certified as DBEs and will not be counted in its DBE participation reports (and still be counted in the overall DBE goal).
- In order to have the information that allows it to explore this factor, GDOT should collect information on the race/ethnicity/gender ownership of all firms participating in its contracts as prime contractors and subcontractors, not just DBEs.

BBC recommends that GDOT keep a record of DBE participation on FHWA-funded contracts and a separate accounting of MBE/WBE participation during a fiscal year.

**Flexible use of any race-conscious measures — 49 CFR Section 26.51(f).** GDOT must exercise flexibility in any use of race-conscious measures such as DBE contract goals, as explained in 49 CFR Section 26.51(f)(2). For example, if GDOT determines that it is exceeding its overall DBE goal in a fiscal year, it must reduce or eliminate any use of DBE contract goals to the extent necessary. If it determines that it will fall short of the overall DBE goal, then it must make appropriate modifications in the use of neutral and/or race-conscious measures to allow it to meet the overall goal.

If, after implementation of any additional neutral remedies, GDOT observes improvements in utilization for certain racial/ethnic/gender groups on state-funded contracts (in comparison to the availability of these groups for such contracts), it might then change its projection of how much of the overall annual DBE goal can be achieved through neutral means in future years.

**Good faith effort procedures — 49 CFR Section 26.53.** Under the Federal DBE Program, bidders do not have to meet the DBE goal to be awarded a contract. The Program requires agencies to also consider bidders that make good faith efforts to meet the contract goal. USDOT has provided guidance for agencies to review good faith efforts, including materials in Appendix A of 49 CFR Part 26. GDOT's current DBE Program outlines the good faith efforts process that it would use if it continues to use DBE contract goals.

The Final Rule effective February 28, 2011 amends the requirements for good faith efforts procurements when using DBE contract goals (see 49 CFR Section 26.53(f)).

**Counting DBE and MBE/WBE participation — 49 CFR Section 26.55.** Section 26.55 of the Federal DBE Program identifies how agencies should count DBE participation. Section 26.11 provides for the Uniform Report of DBE Awards or Commitments and Payments.

**Comprehensive reporting of DBE participation.** GDOT should consider the following improvements to its overall tracking systems and procedures.

- In the disparity study, GDOT and BBC were able to collect prime contract and subcontractor data for local agency contracts through contacts with agencies and prime contractors. For future studies and evaluation, GDOT should consider improving its data collection and tracking for both FHWA- and state-funded contracts awarded by local agencies.
- GDOT should also institute efforts to track actual participation of DBEs and minority- and women-owned firms in its consultant contracts. For purposes of the disparity study, BBC compiled this information from hard-copy monthly invoices.
- GDOT should train prime contractors and staff to enter dollar amounts for all subcontractors for FHWA- and state-funded construction contracts in its TRANSPORT data system. This improvement should start with dollar amounts at the time a subcontract is awarded and include any change orders. It should also track actual payments. GDOT should implement similar requirements for suppliers on its construction contracts.

**Reporting of MBE/WBE participation in addition to DBE participation.** In addition to tracking DBE participation, BBC recommends that GDOT develop procedures and databases to track MBE/WBE participation in FHWA- and state-funded contracts. This will help GDOT track effectiveness of neutral programs for both FHWA- and state-funded contracts and, if necessary, provide important information behind any shortfalls in annual DBE participation, including preparing utilization reports for all minority- and women-owned firms.<sup>1</sup>

- GDOT should use the BBC database developed as part of this study as a starting point for tracking MBE/WBE utilization.
- Firms doing business with GDOT as a prime contractor or subcontractor should be required to identify race/ethnicity/gender ownership information as part of the contractor/consultant prequalification and registration process, or through a similar effort.
- GDOT should collect similar information for prime contractors and subcontractors participating in local agency contracts that use funds administered through the Department.
- GDOT should collect and report information for prime contractor and subcontractor utilization on both FHWA- and state-funded contracts.
- GDOT should also continue to prepare reports on the participation of certified DBEs in FHWA-funded contracts, as required under the Federal DBE Program.

**DBE certification — 49 CFR Part 26 Subpart D.** GDOT is a certifying member of the Georgia Uniform Certification Program. Firms interested in doing business with GDOT that are seeking DBE certification can be certified from a certifying member of the Georgia UCP.

There are two revenue ceilings that affect agency certification of DBEs:

- A maximum annual revenue for any firm seeking DBE certification that is established as part of the Federal DBE Program (\$22,410,000, as indicated in 49 CFR Section 26.69(b)); and
- Size standards that define small businesses set by the U.S. Small Business Administration.

Because both sets of size limits can change on an annual basis, GDOT should monitor these changes and reflect them in its DBE Program Plan. For example, the SBE issued new size standards for certain transportation and professional services subindustries effective March 12, 2012. Prior to this change, engineering firms could only be certified as DBEs if their revenue was below a \$4.5 million limit. The change increased the limit to \$14 million.<sup>2</sup>

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<sup>1</sup> Including MBE/WBEs that are self-identified.

<sup>2</sup> See 77 Fed. Reg. 7490 (February 10, 2012); <http://www.gpo.gov/fdsys/pkg/FR-2012-02-10/pdf/2012-2659.pdf#page=1>.

The Final Rule effective February 28, 2011 changed the ceiling for personal net worth used for DBE certification to \$1,310,000. GDOT will need to update this portion of its DBE Program Plan to reflect the new rule. It should monitor any future changes to the personal net worth limits.

The Final Rule effective February 28, 2011 also facilitates DBE certification across multiple states. GDOT should ensure that its DBE Program Plan accommodates these changes.

**Monitoring other changes to the Federal DBE Program.** The Federal DBE Program regulations periodically change, and USDOT also issues new guidance concerning implementation of the Program. In 2012, USDOT anticipates issuing proposed rules that change certain reports and certification documents. GDOT should monitor these developments.

In three states, implementation of the Federal DBE Program by the state departments of transportation is currently under review in federal court (see Chapter 2 and Appendix A of this report). GDOT should continue to monitor relevant court decisions in these and other cases.

## **B. Implementation of Programs for GDOT State-funded Contracts**

The Federal DBE Program does not pertain to state-funded contracts. GDOT should consider implementing race- and gender-neutral measures for its state-funded contracts.

GDOT should also initiate internal reporting of MBE/WBE and DBE utilization on state-funded contracts using the same methods that it would use for FHWA-funded contracts. That practice will allow GDOT to track how well it is addressing the disparities that BBC found for certain MBE/WBE groups in its state-funded contracts. Monitoring utilization and assessing progress in addressing any disparities for state-funded contracts will also help GDOT understand how its neutral programs may be affecting participation in its FHWA-funded contracts.

## **C. Appropriate Staffing and Funding of Programs**

The effectiveness of GDOT's future implementation of the Federal DBE Program will depend in part on the resources committed for staffing, training and information systems, as well as GDOT's funding of technical assistance and other programs to assist small businesses and DBEs.